

Mark J. Tamblyn (S.B.N. 179272)
Email: mjt@wtwlaw.com
Wexler Toriseva Wallace
1610 Arden Way, Suite 290
Sacramento, California 95815
Phone: (916) 568-1100
Fax: (916) 568-7890

Bernard Persky (*Pro Hac Vice Pending*)
Email: Bpersky@labaton.com
Hollis L. Salzman (*Pro Hac Vice Pending*)
Email: Hsalzman@labaton.com
Kellie Lerner (*Pro Hac Vice Pending*)
Email: Klerner@labaton.com

Labaton Sucharow LLP
140 Broadway
New York, NY 10005
Telephone: (212) 907-0700
Facsimile: (212) 818-0477

***Attorneys for Plaintiff and the Class
(Additional Counsel on Signature Page)***

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

JEMS SOFTWARE AND CONSULTING,
INC., on behalf of itself and all others
similarly situated.

Plaintiff.

v

LEXAR MEDIA, INC., et al.

Defendants

Case No.: 3:07-CV-05041-EMC

**PLAINTIFF JEMS SOFTWARE AND
CONSULTING, INC.'S NOTICE OF
CROSS-MOTION AND CROSS-MOTION
TO APPOINT LABATON SUCHAROW
LLP AS INTERIM LEAD COUNSEL OR,
IN THE ALTERNATIVE, AS INTERIM
CO-LEAD COUNSEL FOR DIRECT
PURCHASER PLAINTIFFS; RESPONSE
TO MOTIONS FOR APPOINTMENT OF
INTERIM CO-LEAD COUNSEL FOR
DIRECT PURCHASER PLAINTIFFS;
AND MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF**

Date: October 30, 2007
Time: 1:00 p.m.
Courtroom: 3, Third Floor

The Honorable Edward M. Chen

1 **NOTICE OF CROSS-MOTION AND CROSS-MOTION TO APPOINT**
2 **LABATON SUCHAROW LLP AS INTERIM LEAD COUNSEL**
3 **OR, IN THE ALTERNATIVE, AS INTERIM CO-LEAD COUNSEL**
4 **FOR DIRECT PURCHASER PLAINTIFFS; AND NOTICE OF RESPONSE TO**
5 **MOTIONS FOR APPOINTMENT OF INTERIM CO-LEAD COUNSEL**
6 **FOR DIRECT PURCHASER PLAINTIFFS**

7 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

8 **PLEASE TAKE NOTICE** that on October 30, 2007, at 1:00 p.m., or as soon thereafter
9 as the matter may be heard, before Hon. Saundra B. Armstrong at the United States District
10 Court for the Northern District of California, 94612, Plaintiff Jems Software and Consulting, Inc.
11 will and hereby does move this Court for an order appointing its attorneys, Labaton Sucharow
12 LLP, as Interim Lead Counsel, or in the alternative, as Interim Co-Lead Counsel for the Direct
13 Purchaser Plaintiffs.

14 This motion is brought pursuant to Rule 23(g) of the Federal Rules of Civil Procedure.
15 The grounds for this motion are that this complex case will benefit from the appointment of
16 interim lead counsel and that Labaton Sucharow LLP is the most qualified for this position
17 because, among other reasons, it is the only petitioning firm with an undivided loyalty to the
18 putative Class. This motion is based on this Notice of Cross-Motion and Cross-Motion To
19 Appoint Labaton Sucharow LLP As Interim Lead Counsel Or, In The Alternative, As Interim
20 Co-Lead Counsel For Direct Purchaser Plaintiffs; Response to Motions To Appoint Interim Co-
21 Lead Counsel For Direct Purchaser Plaintiffs; And Memorandum Of Points And Authorities In
22 Support Thereof; the Declaration of Hollis L. Salzman In Support of Plaintiff Jems Software and
23 Consulting, Inc.'s Notice of Cross-Motion And Cross-Motion To Appoint Labaton Sucharow
24 LLP As Interim Lead Counsel Or, In The Alternative, As Interim Co-Lead Counsel For Direct
25 Purchaser Plaintiffs; Response to Motions To Appoint Interim Co-Lead Counsel For Direct
26 Purchaser Plaintiffs; the [Proposed] Order Appointing Labaton Sucharow LLP As [Interim Lead
27 Counsel] [Interim Co-Lead Counsel] For Direct Purchaser Plaintiffs; the record in this matter;
28 and any arguments of counsel.

1 Dated: October 9, 2007

2 Respectfully submitted,

3 **Wexler Toriseva Wallace**

4 By: /s/ Mark J. Tamblyn

5 Mark J. Tamblyn (S.B.N. 179272)
6 1610 Arden Way, Suite 290
7 Sacramento, CA 95815
Phone: (916) 568-1100
Fax: (916) 568-7890

8 Bernard Persky
9 Hollis L. Salzman
Kellie Lerner
10 **Labaton Sucharow LLP**
11 140 Broadway
New York, NY 10005
12 Telephone: (212) 907-0700
Facsimile: (212) 818-0477

13 Mark Shane
14 **The Law Offices of Shane and White LLC**
15 1676 Route 27
Edison, NJ 08817
16 Telephone: (732) 819-9100

17 Attorneys for Plaintiff and the Class

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
 2 **CROSS-MOTION TO APPOINT LABATON SUCHAROW LLP AS**
 3 **INTERIM LEAD COUNSEL OR, IN THE ALTERNATIVE, AS INTERIM CO-LEAD**
 4 **COUNSEL FOR DIRECT PURCHASER PLAINTIFFS AND RESPONSE TO**
 5 **MOTIONS FOR APPOINTMENT OF INTERIM CO-LEAD COUNSEL**

6 **I. INTRODUCTION**

7 Plaintiff Jems Software and Consulting, Inc. (the "Jems Plaintiff") by its undersigned
 8 counsel, respectfully moves the Court, pursuant to Rule 23(g)(2)(A) of the Federal Rules of Civil
 9 Procedure, to appoint Labaton Sucharow LLP ("Labaton Sucharow") as Interim Lead Counsel
 10 or, in the alternative, as Interim Co-Lead Counsel for the Direct Purchaser Actions¹ that have
 11 been deemed related by this Court.

12 The Jems Plaintiff submits that the proposed appointment of Labaton Sucharow is in the
 13 best interests of the Class. Labaton Sucharow is a highly experienced firm with a proven record
 14 of success and leadership in managing, litigating and prevailing in complex antitrust class
 15 actions. Labaton Sucharow has previously obtained several landmark antitrust and class action
 16 recoveries. Moreover, Labaton Sucharow does not serve in a leadership capacity in other class
 17 actions against the defendants in the Direct Purchaser Actions. Thus, it is uniquely situated to
 18 provide undivided loyalty to the proposed Direct Purchaser Class.

19 In contrast, of the other known movants for lead counsel, all but one firm² already serves
 20 in a leadership capacity in one or more class actions against certain of the same defendants in the
 21 Direct Purchaser Actions. Indeed, the existing leadership roles of these movants may
 22 compromise their loyalties and duties to the proposed Class in the Direct Purchaser Actions. The
 23 appointment of Labaton Sucharow, independent class counsel, to vigorously prosecute the Direct
 24 Purchaser Actions solely on behalf of the Class is essential under Rule 23(g). Accordingly,
 25 Plaintiff's motion should be granted, and the competing motions should all be denied.

26 ¹ The "Direct Purchaser Actions" refers to Case No. 07-05041 and the direct purchaser cases
 27 this Court has deemed related to Case No. 07-00086-SBA.

28 ² The only known movant that does not serve in a leadership capacity in another class action
 29 against the same defendants is Reinhardt, Wendorf & Blanchfield. However, this firm
 30 principally supports the appointment of Saveri & Saveri, Inc and Pearson, Simon, Soter,
 31 Warshaw & Penny LLP as Interim Co-Lead Counsel.

1 In the alternative, this Court should appoint Labaton Sucharow as Interim Co-Lead
 2 Counsel as part of any larger lead counsel structure selected by the Court. This approach will
 3 also serve to negate the above-referenced issue by ensuring that counsel with undivided loyalty
 4 to the Class is present during the course of any settlement or other negotiations during the
 5 prosecution of the case, where the appearance of a potential conflict of interest is most likely to
 6 arise. Moreover, Labaton Sucharow will, if appointed, work inclusively and co-operatively with
 7 attorneys from the other class counsel movants in the prosecution of the Direct Purchaser
 8 Actions. Such a larger structure is also justified by additional factors, including the large number
 9 of defendants (23), the international discovery burden, and the many complex issues here. *See,*
 10 *e.g., In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 515 (S.D.N.Y. 1996)
 11 (appointing four co-lead counsel in a multiple defendant case). Finally, the majority of known
 12 movants for lead counsel are based in Northern California, while the defendants are located
 13 around the globe. Appointing Labaton Sucharow, a New York City-based firm, as part of an
 14 Interim Co-Lead structure will, therefore, promote geographic balance within the leadership of
 15 the Direct Purchaser Actions. *Takeda v. Turbodyne Techs., Inc.*, 67 F. Supp. 2d 1129, 1139
 16 (C.D. Cal. 1999).

17 II. NATURE OF THE DIRECT PURCHASER ACTIONS

18 The Jems Plaintiff brings this lawsuit as a Class Action on behalf of individuals and
 19 entities who purchased Flash Memory directly from Defendants, their subsidiaries, agents, or co-
 20 conspirators during the period from at least January 1, 1999 through the present (“Class Period”).
 21 As used herein, the term “Flash Memory” means all types of Flash Memory sold during the
 22 Class Period, including AND, Not AND (“NAND”), and Not OR (“NOR”) technologies, but
 23 excludes all types of static random access memory (“SRAM”) or dynamic random access
 24 memory (“DRAM”) sold during the Class Period.

25 III. PROCEDURAL BACKGROUND

26 Numerous related class actions have been filed alleging price fixing of Flash Memory, a
 27 form of electronic memory that can be reprogrammed and erased. This type of memory is used
 28 in cellular phones, digital audio players, personal computers, digital phones, home gaming

1 consoles and Global Positioning Systems. Defendants are manufacturers of Flash Memory in the
2 United States and around the world.

3 All of the known direct purchaser actions are currently pending in the Northern District
4 of California. On September 17, 2007, Plaintiff A Computer Place, Inc. ("Computer Place
5 Plaintiff") filed a Motion to Appoint Saveri & Saveri, Inc. and Pearson, Simon, Soter, Warshaw
6 & Penny LLP as Interim Class Counsel for Direct Purchaser Plaintiffs. On September 25, 2007,
7 Plaintiff Richard Thal filed a Cross-Motion for Appointment of Lieff, Cabraser, Heiman &
8 Bernstein, LLP as Interim Lead or Co-Lead Counsel for Direct Purchasers. Plaintiff Laura
9 Young responded on September 26, 2007 with a motion supporting the Computer Place
10 Plaintiff's proposed structure, or in the alternative, the appointment of Reinhardt, Wendorf &
11 Blanchfield as Interim Co-Lead Counsel with Saveri & Saveri, Inc. and Pearson, Simon, Soter,
12 Warshaw & Penny LLP. Similarly, Plaintiff Westell Technologies, Inc. filed a motion
13 supporting Computer Place, but added that Freed Kanner London & Millen LLC should be
14 appointed a third Co-Lead should the Court determine that a two-firm Co-Lead structure is
15 insufficient. The Jems Plaintiff files this motion to appoint Labaton Sucharow LLP as Interim
16 Lead or Co-Lead Counsel. For the reasons stated herein, the appointment of Labaton Sucharow
17 will best serve to protect the interests of the proposed Class.

18 **IV. ARGUMENT**

19 "In multi-party, multi-case litigation, the district court's success is largely dependent
20 upon its ability to uncomplicate matters." *In re Recticel Foam Corp.*, 859 F.2d 1000, 1004 (1st
21 Cir. 1988). Thus, the "multiplicity of suits requires that the district court be allowed to combine
22 procedures, appoint lead counsel, recognize steering committees of lawyers, limit and manage
23 discovery, etc. to minimize expense to all litigants and to provide judicial efficiency." *In re*
24 *Showa Denko K.K. L-Tryptophan Prods. Liab. Litig.-II*, 953 F.2d 162, 165 (4th Cir. 1992); *see*
25 *also In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 644 (E.D. Pa. 2003); MANUAL FOR
26 COMPLEX LITIGATION (Fourth) § 10.22 (2004) (the "Manual").

1 **A. Appointment Of Interim Lead Counsel Is Necessary**
 2 **To Achieve Efficiency And Economy In This Litigation.**

3 Appointment of Interim Lead Counsel is critical to advancing this litigation and
 4 proceeding with discovery in an organized and efficient manner. The appointment of Interim
 5 Lead Counsel is consistent with the *Manual's* recommended organizational structure and
 6 ultimate goal of achieving “efficiency and economy” in the litigation. *See Manual* § 10.221.
 7 The proposed Interim Lead Counsel, Labaton Sucharow, clearly meets all criteria for Class
 8 Counsel required by Fed. R. Civ. P. 23(g). Labaton Sucharow will fairly and adequately
 9 represent the interests of the class. *See Fed. R. Civ. P. 23(g)(1)(B).*

10 Rule 23(g)(1)(C) sets out those factors that must be considered in connection with the
 11 appointment of class counsel. In appointing class counsel, the court must consider:

- 12 • the work counsel has done in identifying or investigating
 potential claims in the action,
- 13 • counsel’s experience in handling class actions, other
 complex litigation, and claims of the type asserted in the
 action,
- 14 • counsel’s knowledge of the applicable law, and
- 15 • the resources counsel will commit to representing the class.

16 In addition, the Court may “*consider any other matter pertinent to counsel’s ability to fairly and*
 17 *adequately represent the interests of the class.*” (emphasis added). The totality of these factors
 18 militates in favor of appointing Labaton Sucharow as Interim Lead or Co-Lead Counsel for the
 19 Direct Purchaser Class.

20 **1. Labaton Sucharow Will Serve The Class With Undivided Loyalty.**

21 The Computer Place Plaintiff and cross-movants propose Interim Lead Counsel who may
 22 be compromised in their ability to “fairly and adequately represent the interests of the class,” as
 23 required by Rule 23(g). Specifically, the appointment of these firms raises potential questions of
 24 undivided loyalty to the Class in this case based on their current prosecution of other class
 25 actions against many of the same defendants in this case. For instance, the following firms also
 26 serve on the Steering Committee or as Co-Lead counsel in similar class actions involving many
 27 of the same defendants in the Direct Purchaser Actions:

- 1 • Saveri & Saveri, Inc., Co-Lead Counsel in *In re Dynamic*
2 *Random Access Memory Antitrust Litigation* ("DRAM")
3 Litigation), MDL No. M:07-cv-01827 (SI) (N.D. Cal);
4 Steering Committee in *In re Static Random Access Memory*
5 *Antitrust Litigation* ("SRAM Litigation"), M:07-cv-01819-CW;
- 6 • Pearson, Simon, Soter, Warshaw & Penny, LLP,
7 Interim Co-Lead Counsel in *In Re TFT-LCD (Flat Panel)*
8 *Antitrust Litigation* ("LCD Litigation"), MDL No. M:07-
9 cv-01827 (SI) (N.D. Cal); Co-Chair of Discovery in DRAM
10 Litigation;
- 11 • Freed Kanner London & Millen LLC, Steering Committee
12 in SRAM Litigation; Co-Chair of Discovery in DRAM
13 Litigation; and
- 14 • Lieff Cabraser Heimann & Bernstein, LLP, Interim Co-
15 Lead Counsel in LCD Litigation; Steering Committee in
16 SRAM Litigation.

12 Should the Court appoint these firms to a leadership position in this case, they would be
13 placed in a position of representing different classes of plaintiffs with competing claims against
14 the same overlapping defendants. Indeed, virtually all of the defendants in the Direct Purchaser
15 Actions are also defendants in one or more other class actions involving price-fixing allegations
16 concerning computer-related products.

17 This representation of separate classes against the same defendant creates the possibility
18 of two distinct potential conflicts of interest. First, should any of the repeat defendants have a
19 finite pool of assets from which a recovery is being sought, each class would be vying to recover
20 from the same potentially limited fund. Second, with regard to settlement negotiations, class
21 counsel may favor the interests of one class at the expense of another to obtain a global
22 settlement and release from a single defendant without adequate regard to the relative strengths
23 or weaknesses of the claims of each class.³ While none of the proposed firms for interim lead

25 ³ In *Krim v. pcOrder.com, Inc.*, 210 F.R.D. 581 (W.D. Tex. 2002), the court further
26 expounded upon the potential for a conflict of interest under these circumstances in the context
27 of settlement negotiations. It explained:

28 [T]he interests of the counsel may conflict with the members
 of one or more of the classes. The inability of counsel to discuss
 settlement offers in the other cases and the potential influence one

1 counsel have engaged, or would intentionally engage in unethical conduct, the potential for
 2 either of these conflicts, and the appearance of such possible conflicts, renders their current
 3 proposals for appointment as class counsel unsuitable and not in the best interests of the Class.

4 The above-referenced potential conflicts inherent in bringing multiple class actions
 5 against the same defendants are well known. 7A Charles A. Wright & Arthur R. Miller, *Federal*
 6 *Practice and Procedure* §1769.1 (2d ed. 1986) (“A conflict of interest . . . may be present,
 7 however, if class counsel is involved in multiple lawsuits for the named representatives or
 8 against the same defendants”). This concern has prompted several courts, including this Court,
 9 to hold proposed interim lead class counsel inadequate because of its representation of separate
 10 classes against the same defendant.

11 The court in *In re Cardinal Health, Inc. ERISA Litigation* squarely addressed this issue.
 12 225 F.R.D. 552 (S.D. Ohio 2005). In *Cardinal Health*, the court considered competing motions
 13 for the appointment of lead counsel in an ERISA action. One of the firms that moved for lead
 14 counsel also represented a class in a separate action against the same defendant. *Id.* Several
 15 plaintiffs argued that this firm could not serve as lead counsel because its dual representation of
 16 two separate classes against the same defendant “will create a situation in which one group of
 17 plaintiffs is inevitably favored.” The court agreed, holding that counsel could not represent
 18 separate classes of plaintiffs against the same defendant. *Id.* at 557. Specifically, the court found
 19 that “[i]f the amount sought by each proposed class could exceed the total assets of the
 20 Defendants, then ‘competing claims may impair counsel’s ability to vigorously pursue the
 21 interest of both classes.’” *Id.* (internal citations omitted); cf. *Dietrich v. Bauer*, 192 F.R.D. 119,
 22 126 (S.D.N.Y. 2000) (allowing counsel to represent two overlapping classes because the actions
 23 were filed against different defendants).

24

25 (*... continued*)

26 case may have on a decision to settle the other are only part of the
 27 problem. Counsel are also limited in the information they can or
 will have the incentive to divulge because of their representation of
 different parties.

28 *Id.* at 590.

1 This Court has come to the same conclusion. *See Strigliabotti v. Franklin Res., Inc.*, No.
 2 C-04-0083, 2006 WL 2792417, at *4 (N.D. Cal. Sept. 27, 2006). In *Strigliabotti*, the Court
 3 specifically considered the adequacy of class counsel who brought both class and derivative
 4 actions against the same defendant. The Court held that the simultaneous representation of two
 5 interested groups of claimants against the same defendant posed a conflict of interest. In so
 6 holding, the Court explained that “the class and the derivative actions would be competing for
 7 the same pool of money, thus creating a structural incentive to favor one group over the other.”
 8 *Id.*; *see also Kuper v. Quantum Chem. Corp.*, 145 F.R.D. 80, 83 (S.D. Ohio 1992) (“The
 9 rationale for those holdings- that class counsel should not be subject to divided loyalties- applies
 10 equally to the competing interests of separate classes vying for relief from the same limited
 11 source.”).

12 Indeed, even the mere appearance of a potential conflict is sufficient reason to reject a
 13 proposed leadership structure that involves overlapping classes. *See Kayes v. Pacific Lumber*
 14 *Co.*, Nos. C-89-3500, C-91-1812, 1993 U.S. Dist. LEXIS 21090, at *26 (N.D. Cal. April 14,
 15 1993) (denying class certification because of potential conflict of interest and finding “[t]he
 16 responsibility of class counsel to absent class members whose control over their attorneys is
 17 limited does not permit even the appearance of divided loyalties of counsel”) (Armstrong, J.)
 18 (internal citation omitted); *ABA Code of Professional Responsibility*, DR 5-105 and EC 5-14
 19 (prohibiting counsel from representing different plaintiffs with conflicting claims).

20 The Direct Purchaser Class should not be burdened with the complications that may
 21 result from either actual conflicts or potential conflicts inherent in the proposed leadership
 22 structure of the movants. Instead, the Jems Plaintiff respectfully submits that Labaton Sucharow,
 23 a firm that is not in the leadership in any of the other pending groups of class actions against
 24 these same defendants, should be appointed Interim Lead Counsel, so that the interests of the
 25 proposed Direct Purchaser Class are best protected.

26

27

28

1 **2. Labaton Sucharow Is The Best Choice To Promote
The Efficient Prosecution Of The Direct Purchaser Actions**

2

3 If appropriate structural safeguards are not put in place now, the Class may be exposed to
 4 adequacy of representation challenges at later stages of the litigation, such as class certification
 5 or settlement approval. The Court has the opportunity at this time to address this manifest
 6 inefficiency by appointing Interim Lead Counsel that will best represent the Class throughout the
 7 entire litigation. *See, e.g., In re Williams Co. ERISA Litig.*, No. 02-CV-153, 2002 U.S. Dist.
 8 LEXIS 27691 (N.D. Okla. Oct. 28, 2002) (considering class certification requirements when
 9 appointing lead counsel).

10 For instance, in *Kuper*, defendants challenged plaintiffs' motion for class certification by
 11 arguing that class counsel was inadequate due to its concurrent representation of bondholders
 12 and stock holders against the same defendants. 145 F.R.D. at 83. In denying class certification,
 13 the court found that the question of whether counsel was qualified to represent the class did not
 14 hinge on whether an actual conflict exists, but rather, whether a conflict could develop in the
 15 future. *Id.* ("the finding that no direct conflict currently exists is not dispositive of whether
 16 Plaintiffs' counsel is qualified to represent the class"); *Kayes v. Pacific Lumber Co.*, 51 F.3d
 17 1449, 1465 (9th Cir. 1995) ("The 'appearance' of divided loyalties refers to differing and
 18 potentially conflicting interests and is not limited to instances manifesting such conflict."). The
 19 court, therefore, held that counsel's representation of competing classes would "impair" its
 20 "ability to vigorously pursue the interests of both classes." *Id.*; *see also Strigliabotti*, 2006 WL
 21 2792417, at *4 (denying class certification because of overlapping representation, which would
 22 create a "structural incentive to favor one group over the other").

23 Similarly, in *Jackshaw Pontiac, Inc. v. Cleveland Press Publishing Co.*, 102 F.R.D. 183
 24 (N.D. Ohio 1984), the court found that the representation of separate classes rendered counsel
 25 inadequate because both classes were seeking to recover from the same pool of finite assets of
 26 the defendant. *Id.* at 192. *See also Krim*, 210 F.R.D. at 589 (holding that proposed lead counsel
 27 were unable to satisfy Rule 23's adequacy requirement because they were involved in multiple
 28 lawsuits against the same defendant representing different classes of shareholders, explaining

1 that “[c]lass counsel must act with unwavering and complete loyalty to the class members they
 2 represent.”); *Sullivan v. Chase Inv. Servs. of Boston, Inc.*, 79 F.R.D. 246, 258 (N.D. Cal. 1978)
 3 (finding a conflict based on counsel’s dual representation and attempt to recover from the same
 4 limited pool of assets, concluding that “[t]he responsibility of class counsel to absent class
 5 members whose control over their attorneys is limited does not permit even the appearance of
 6 divided loyalties of counsel”).

7 These potential conflict of interest concerns do not end at class certification. Similar
 8 arguments may be made by objectors to any proposed class settlement unless structural
 9 protections are put in place now. For example, the parties were confronted with this issue in *In*
 10 *re Relafen Antitrust Litigation*, 231 F.R.D. 52 (D. Mass. 2005). There, a proposed global
 11 settlement was reached that encompassed various groupings of state law claims. Objectors
 12 opposed the proposed settlement, arguing that “class counsel ‘was too lazy (or too selfish)’ to
 13 ensure that residents of different states were fairly represented.” *Id.* at 76 (internal citations
 14 omitted). The court disagreed because of the structural safeguards that had been put in place,
 15 which included independent counsel for each group of states. *Id.*; see also *In re Warfarin*
 16 *Sodium Antitrust Litig.*, 212 F.R.D. 231, 250 (D. Del. 2002) (finding that the existence of
 17 separate consumer and third-party payor counsel provides adequate “structural protections to
 18 assure that differently situated plaintiffs negotiate for their own unique interests.”); *Nichols v.*
 19 *Smithkline Beecham Corp.*, No. Civ. A 00-6222, 2005 WL950616 (E.D. Pa. April 22, 2005)
 20 (approving final settlement agreement because the interests of third-party payors and consumers
 21 were represented by separate counsel); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205
 22 F.R.D. 369, 389-94 (D.D.C. 2002). Given the breadth of possible objections that may arise in
 23 the context of global settlements for classes or subclasses, the need for independent counsel to
 24 negotiate the settlements of completely separate classes against overlapping defendants is even
 25 more critical.

26 The Class in this case may face the same preventable hurdles because of the multiple
 27 representation of certain of the proposed Interim Lead Counsel. This challenge would be
 28 avoided entirely by appointing Labaton Sucharow as Interim Lead Counsel. Alternatively,

1 should the Court determine that one or several of the other movants may appropriately serve as
 2 Interim Lead Counsel, the Jems Plaintiff respectfully requests that Labaton Sucharow be
 3 appointed as additional Co-Lead Counsel to ensure that at least one firm with undivided loyalties
 4 to the Class oversees the litigation. This appointment is even more critical for purposes of
 5 settlement negotiations, where it is particularly necessary to involve wholly independent counsel
 6 to represent the Class, which is competing with the other classes to recover from the same pool
 7 of assets.

8 **3. Labaton Sucharow Has The Experience, Knowledge, Resources
 and Other Qualifications To Serve As Interim Lead Counsel**

10 Labaton Sucharow has vigorously litigated and settled numerous antitrust class actions.
 11 *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 261 (D. Del. 2002), *aff'd*, 391
 12 F.3d 516 (3d Cir. 2004) (Judge Sue Robinson, when approving \$44.5 million settlement, noted
 13 that "class counsel are well-qualified to litigate this type of complex class action, and they
 14 showed their effectiveness in the case at bar through the favorable cash settlement they were able
 15 to obtain.").

16 Labaton Sucharow has been at the forefront in obtaining substantial recoveries on behalf
 17 of classes of direct purchasers in antitrust litigations around the country. For instance, Labaton
 18 Sucharow recently obtained \$47 million in settlements on behalf of a direct purchaser class of
 19 equity options purchasers injured by an alleged scheme to restrict the exchange listing of equity
 20 options. *In re Stock Exchs. Options Trading Antitrust Litig.*, MDL No. 1283, C.A. No. 1:99-cv-
 21 00962 (RCC) (S.D.N.Y.); *see also In re Maltol Antitrust Litig.*, C.A. No. 1:99-cv-05931 (TPG)
 22 (S.D.N.Y.) (obtaining as Co-Lead Counsel \$18 million in settlements of price fixing and market
 23 allocation claims against Pfizer, Inc. and certain foreign defendants on behalf of businesses that
 24 directly purchased the food additives maltol and sodium erythorbate).

25 Labaton Sucharow is also responsible for substantial recoveries on behalf of indirect
 26 purchasers in prescription drug class actions. In 2004, Labaton served as Co-Lead counsel in *In*
 27 *re Buspirone Antitrust Litigation*, MDL No. 1413 (S.D.N.Y.), and obtained final approval of a
 28 \$90 million settlement with defendants on behalf of consumers and their health insurance

1 providers. The settlement allocated funds to consumers in many states and third-party payors
 2 nationwide, and settled actions alleging anticompetitive conduct by improperly extending the
 3 monopoly in the market for buspirone hydrochloride, an anti-anxiety drug sold under the brand
 4 name BuSpar. In approving the settlement, Judge John G. Koeltl commended lead counsel,
 5 including Labaton Sucharow, as follows: "Let me say that the lawyers in this case have done a
 6 stupendous job. They really have."

7 Labaton Sucharow, as Co-Lead Counsel, represented consumers and third-party payors in
 8 litigation against Mylan Laboratories, Inc. and others regarding alleged price increases for
 9 generic versions of certain prescription drugs. See *In re Lorazepam & Clorazepate Antitrust*
 10 *Litig.*, No. MDL 1290 (TFH), 2003 WL 22037741 (D.D.C. June 16, 2003). These actions were
 11 jointly litigated with the Federal Trade Commission and various state Attorneys General. The
 12 third-party payor and consumer actions resulted in a total of \$135.4 million in settlements.

13 Labaton Sucharow has also obtained extraordinary recoveries in other complex class
 14 actions. For instance, as Co-Lead Counsel, Labaton Sucharow obtained a total of \$101 million
 15 in settlements on behalf of a class of NYMEX natural gas futures traders injured by defendant
 16 energy companies' alleged manipulation of published price indices. This is the second-largest
 17 class action commodities manipulation recovery on record. *In re Natural Gas Commodity*
 18 *Litigation*, C.A. No. 1:03-cv-06186 (VM) (S.D.N.Y.).

19 The following represent a sampling of the recent appointments of Labaton Sucharow as
 20 Lead or Co-Lead Counsel in major pending antitrust class actions:

- 21 • *In re Air Cargo Shipping Services Antitrust Litigation*, C.A.
 No. 1:06-MD-01775 (CBA) (EDNY), Labaton Sucharow
 was appointed co-lead counsel for plaintiffs and a proposed
 class of businesses and consumers who allege that the
 defendant airlines participated in a global conspiracy to fix
 shipment surcharges in the \$50 billion airfreight shipping
 services industry and to allocate customers, routes and
 territories.
- 25 • *In re Abbott Laboratories Antitrust Litigation*, C.A. NO.
 4:04-CV-01511-CW (N.D. Cal), Labaton Sucharow has
 been prosecuting the case as co-lead counsel since 2004,
 shortly after Abbott raised the price of a key HIV drug,
 Norvir, by 400%.

- 1 • *In re Foundry Resins Antitrust Litigation*, C.A. NO. 2:04-
 2 MD-01638-GLF-MRA (S.D. Ohio), Labaton Sucharow
 3 was appointed co-lead counsel for a plaintiff class of direct
 4 purchasers who allege that defendant suppliers have
 5 illegally conspired to fix prices, rig bids and allocate
 6 customers in the market for foundry resins.

7 Attached as Exhibit A to the Declaration of Hollis L. Salzman in Support of Motion to Appoint
 8 Interim Lead Counsel Or, In The Alternative, As Interim Co-Lead Counsel for Direct Purchaser
 9 Plaintiffs, is the firm resume of Labaton Sucharow.

10 Labaton Sucharow also has committed the resources necessary to prosecute the Direct
 11 Purchaser Actions. For example, even though the Jems Plaintiff only recently filed its
 12 complaint, Labaton Sucharow has been investigating the case since early 2007. Through this
 13 private investigation, Labaton Sucharow has amassed a wealth of confidential materials that will
 14 assist in the prosecution of the litigation. As a matter of course, Labaton Sucharow has advanced
 15 expenses for complex class actions spanning years, in actions in which they have obtained
 16 landmark recoveries. As such, the requirements of Rule 23(g) are satisfied.

17 **4. Alternatively, Labaton Sucharow Should**
 18 **Be Appointed Interim Co-Lead Counsel**

19 Alternatively, the Jems Plaintiff requests the Court to appoint Labaton Sucharow as
 20 Interim Co-Lead Counsel. As discussed above, the inclusion of Labaton Sucharow in any co-
 21 lead counsel structure would ensure that the Class is independently and fairly represented in the
 22 event an actual conflict arises based on the other movants' multiple representation of competing
 23 classes against the same defendants. Moreover, this is a proposed nationwide class action with
 24 defendants located all over the country (and the globe), including New York. A number of
 25 parties, as well as defense counsel, will be located in and around New York. The majority of
 26 movants, however, are located in Northern California or the Midwest. Indeed, not one other firm
 27 currently proposed for Lead or Co-Lead Counsel is located in New York. If the Court were to
 28 appoint an Interim Co-Lead structure, the Jems Plaintiff proposes that New York City-based
 Labaton Sucharow be included to promote geographic balance. *See Takeda*, 67 F. Supp. 2d at

1 1139 (“the geographic diversity of the three co-Lead Counsel should add to, rather than detract
2 from, the efficient handling of this case.”).

V. CONCLUSION

4 For the reasons set forth herein, and in order to provide for the orderly and efficient
5 conduct of the related actions, the Jems Plaintiff respectfully requests that the Court appoint
6 Labaton Sucharow as Interim Lead Counsel.

7 Alternatively, if this Court determines to appoint any larger lead counsel structure, then
8 the Labaton Sucharow Firm should be appointed Co-Lead counsel as part thereof.

9 | Dated: October 9, 2007

Respectfully submitted,

Wexler Toriseva Wallace

By: /s/ Mark J. Tamblyn

13 Mark J. Tamblyn (179272)
14 1610 Arden Way, Suite 290
15 Sacramento, CA 95815
Phone: (916) 568-1100
Fax: (916) 568-7890

21
22 Mark Shane
23 **The Law Offices of Shane and White LLC**
24 1676 Route 27
25 Edison, NJ 08817
26 Telephone: (732) 819-9100

Attorneys for Plaintiff and the Class